**Civil No: B269038**

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

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**CALIFORNIA HIGHWAY PATROL, and STATE COMPENSATION INSURANCE FUND**

**Petitioner,**

**vs.**

**WORKERS' COMPENSATION APPEALS BOARD and DOROTHY MARGARIS**

**Respondents,**

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**WORKERS' COMPENSATION APPEALS BOARD**
**WCAB Case No. ADJ9397913**

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# *Amicus Curiae Brief Of* CALIFORNIA WORKERS' COMPENSATION INSTITUTE

*In Support Of Petitioner*
**CALIFORNIA HIGHWAY PATROL, and STATE COMPENSATION INSURANCE FUND**

***[Submitted Concurrently With Amicus Curiae Application]***

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION

Court of Appeal Case Number: B269038

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Superior Court Case Number: ADJ9397913

FOR COURT USE ONLY

APPELLANT/PETITIONER: CALIFORNIA HIGHWAY PATROL et al

RESPONDENT/REAL PARTY IN INTEREST: WCAB & DOROTHY MARGARIS

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(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (name): Amicus California Workers Compensation Institute

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest (Explain): |
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Date: February 23, 2016

Michael A. Marks, Esq.
(TYPE OR PRINT NAME)

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(SIGNATURE OF PARTY OR ATTORNEY)

Page 1 of 1

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## VERIFICATION & WORD COUNT

I, Michael A. Marks, swear that I have read the within Amicus Curiae brief and know the contents thereof; that the within Argument & Authorities contains 5,837 words, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts and law stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of California Workers' Compensation Institute are absent from the County where my office is located and are unable to verify the petition, and because as their attorney I am more familiar with such facts and law than are the officers.

I declare the truth of the foregoing under penalty of perjury of the laws of the State of California, and that this verification was executed this 24th day of February, 2016, at Essex, Vermont.

Michael A. Marks (SBN 071817)

**IN THE COURT OF APPEAL**

**OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

| | |
|---|---|
| CALIFORNIA HIGHWAY PATROL, and STATE COMPENSATION INSURANCE FUND<br><br>***Petitioner***<br>VS.<br>WORKERS' COMPENSATION APPEALS BOARD and DOROTHY MARGARIS<br><br>***Respondent(s)*** | Civil No: B269038<br>WCAB Case No. ADJ9397913<br><br>**Declaration of Service** |

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is Allweiss & McMurtry, 18321 Ventura Blvd, Suite 500, Tarzana, CA 91356

On February 24, 2016, I both filed with the Court and served a true copy of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief* AND *Amicus Curiae Brief of California Workers' Compensation Institute* via USPS with postage fully prepaid, addressed as follows:

| | | |
|---|---|---|
| William LeRoy Anderson<br>State Compensation Insurance Fund<br>2275 Gateway Oaks Dr.<br>Suite 200<br>Sacramento, CA 95833 | Workers' Compensation Appeals Board<br>P.O. Box 429459<br>San Francisco, CA 94142-9459<br><br>Attn.: Writs | Jill Suzanne Breslau<br>Law Offices Of Jill Suzanne Breslau<br>815 Moraga Drive<br>Suite 1200<br>Los Angeles, CA 90049 |
| | | |

.

I declare, under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct. Executed on February 24, 2016, at Essex, Vermont.

_____ ____

Michael A. Marks, Esq. (SBN 071817)

## ARGUMENT & AUTHORITIES

### THE TIME FOR AN IMR DECISION UNDER LABOR CODE SECTION 4610.6(d) IS DIRECTORY ONLY, THUS NOT GROUNDS FOR INVALIDATING THE IMR DECISION.

#### A. WHILE THIS MATTER HAS BEEN PENDING, THE FIRST APPELLATE DISTRICT – DIVISION 1 HAS ISSUED A PUBLISHED OPINION FINDING LABOR CODE SECTION 4610.6(d) TO BE DIRECTORY ONLY, AND THE SUPREME COURT DENIED A PETITION FOR HEARING

The fundamental issue presented herein is whether the time for the Administrative Director of the Division of Workers' Compensation to issue an Independent Medical Review decision under Labor Code Section 4610.6(d) is mandatory or directory. *In Stevens v. Workers' Comp. Appeals Bd., 241 Cal. App. 4th 1074, 194 Cal. Rptr. 3d 469 (review denied 2/17/16)*, (hereafter referred to as *Stevens*) the First Appellate District – Division 1recently addressed the very question presented herein regarding failure of the IMR determination to issue within the 30 days as set forth in Labor Code Section 4610.6(d). In that published opinion, the Court held that,

> In its final decision, the Board noted that Stevens's (sic) IMR determination took over seven months and found fault with the lack of a statutory mechanism to enforce section 4610.6, subdivision (d)'s requirement that IMR determinations be made within 30 days… **In the absence of a penalty, consequence, or contrary intent, a time limit is typically considered to be directory, and its violation does not require the invalidation of the action to which the time limit applies**. (See, e.g., *California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal.4th 1133, 1145 [43 Cal. Rptr. 2d 693, 899 P.2d 79]*.)

For the reasons outlined below, that published decision correctly resolves the conflicting Appeals Board decisions on this subject. Consistent

with that opinion, this Court should therefore reverse the erroneous Appeals Board decision below.

### B. LABOR CODE SECTION 5313 PROVISION REGARDING A WCAB JUDGE'S TIME TO ISSUE AN OPINION HAS BEEN INTERPRETED AS DIRECTORY, AND THIS COURT SHOULD APPLY LONGSTANDING RULES OF STATUTORY CONSTRUCTION TO SIMILARLY INTERPRET LABOR CODE SECTION 4610.6(d) AS DIRECTORY

The basic rules of statutory construction were succinctly summarized in *City of Martinez v. WCAB* (2000) 85 Cal. App. 4th 601, 616, as follows:

> The fundamental rule is to ascertain and effectuate the intent of the Legislature in enacting the statutes. ( *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal. 3d 222, 230.) In determining the intent, we examine first the words of the statutes. ( *Id.* at p. 231.) Words, however, do not have fixed meanings; they are symbols of thought whose meanings may vary depending upon the context and circumstances in which they are used. ( *Henry v. Workers' Comp. Appeals Bd.* (1998) 68 Cal. App. 4th 981, 984 [80 Cal. Rptr. 2d 631].) We consider the consequences of our interpretation and avoid constructions that defy common sense, frustrate the apparent intent of the Legislature or might lead to absurdity. ( *Id.* at p. 985.) HN16 **It is presumed the Legislature is aware of the existence of all relevant statutes when it considers a change or amends others.** ( *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal. 3d 288, 298 [285 Cal. Rptr. 86, 814 P.2d 1328].) The statutes "should be interpreted in such a way as to make them consistent with each other, rather than obviate one another."

As articulated in *Jiminez v. San Joaquin Valley Labor* (2002) 67 Cal. Comp. Cases 74, 83 (Appeals Bard *en banc*)

> **[i]n enacting legislation, the Legislature is presumed to have knowledge of existing judicial decisions … and to have adopted or amended statutes in light of such decisions**. (*Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977, fn. 10 [568 P.2d 394, 140 Cal. Rptr. 669]; *Clark v. Workers' Comp. Appeals Bd.* (1991) 230 Cal.App.3d 684, 695-696 [281 Cal. Rptr. 485] [56 Cal. Comp. Cases 331, 340]; *Barragan v. Workers'*

> *Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 650-651 [240 Cal. Rptr. 811][52 Cal. Comp. Cases 467, 478]; *Ezzy v. Workers' Comp. Appeals Bd.* (1983) 146 Cal.App.3d 252, 261, fn. 4 [194 Cal. Rptr. 90][48 Cal. Comp. Cases 611, 616, fn. 4].) (emphasis added)

Moreover, *In re Jerry R.,* (1994) 29 Cal. App. 4th 1432, 1437 underscores the importance of consistency of interpretation of similar statutes within the same statutory scheme, observing that

> Statutes are not to be read in isolation, but must be construed with related statutes. ( *People* v.*Craft*, *supra*, 41 Cal. 3d at p. 560.) **When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction**, unless a contrary intent clearly appears. ( *Malcolm* v. *Superior Court* (1981) 29 Cal. 3d 518, 527-528 [174 Cal. Rptr. 694, 629 P.2d 495]; *Los Angeles Met. Transit Authority* v.*Brotherhood of Railroad Trainmen* (1960) 54 Cal. 2d 684, 688 [8 Cal. Rptr. 1, 355 P.2d 905].)

In the context of the statutory scheme and consistency of interpretation of similar Labor Code sections, at least four cases address a situation directly analogous to the one presented herein. Those interpret the Labor Code's 30 day time provision for a WCAB Judge to issue an award as directory. In *Coombs v. Industrial Acc. Com., (1926) 76 Cal.App. 565 [245 P. 445]*, the 30 days to issue an award under the Workmen's Compensation Act, [Cal. Gen. Laws, Act 4749, Section 20(a) (the precursor of Labor Code Sectiono 5313) ] was held to be directory only. In *Peak v. Industrial Acc. Com., (1947) 82 Cal.App.2d 926 [187 P.2d 905]*, the contention that failure to make a decision within the 30 days deprived the commission of jurisdiction was rejected, with the Court calling the contention "absurd". [Id, at 932] The Court in *Janet* v. *Industrial Acc. Com.* (1965) 238 Cal.App.2d 491, 497

specifically rejected the contention that the time limit is jurisdictional and thus an award beyond that time limit is invalid. Even in the face of Labor Code Section 5800.3 making such time limit mandatory and not directory, the Court held that the remedy for such a delay is a writ of mandamus, but does not invalidate the decision.[1] Similarly, in *Liberty Mutual Ins. Co v. IAC* (1964) 231 Cal. App. 2d 501 the Court also rejected the contention that an award issued beyond the 30 day provision was invalid.

Applying the above referenced canons of legislative interpretation regarding a subsequent statute on a similar subject, the Legislature is presumed to have been aware of this prior directory construction of the similar statute when it enacted the decision timeframe for IMR using substantially the same language. Therefore, this Court should agree with the First Appellate District's recent conclusion in *Stevens*, finding 4610.6(d) directory only, and reverse the incorrect decision below.

### C. THE CONSEQUENCE OF FINDING LABOR CODE SECTION 4610.6(d) MANDATORY WOULD BE TO DEPRIVE THE INJURED WORKER OF A VENUE TO CHALLENGE AN ADVERSE UTILIZATION REVIEW DECISION.

As shown in more detail below, under the statutory scheme, an employer's adverse Utilization Review decision may only be challenged via Independent Medical Review [Labor Code Section 4610.5(e)]. The Appeals Board lacks jurisdiction to review an employer's timely Utilization Review determination, *except* via an appeal of an Independent Medical Review decision. Therefore, a finding that the IMR is void because the timeframe is

[1] 8 CCR 9713 prohibits a WCAB judge from being paid if any decisions are outstanding more than 90 days.

mandatory would deprive the injured worker of any statutory means to challenge the employer's adverse UR decision.

The process for addressing medical treatment disputes between the employee and the employer is governed by multiple interrelated Labor Code sections that have been reformed by the legislature on numerous occasions to expedite and improve the quality of treatment and medical decision-making.[2] Labor Code Section 4600 defines the employer obligation and corresponding employee entitlement to "medical treatment that is reasonably required" as in accordance with the "guidelines adopted by the administrative director pursuant to Labor Code Section 5307.27" [Labor Code Section 4600(b)]. To effectuate compliance with those statutory treatment guidelines, Labor Code Section 4610 requires all employers to establish a rigidly prescribed utilization review process to be applied in all cases [*see gen*, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen) (2008) 44 Cal. 4th 230*]. Labor Code Section 4610.5 expressly limits an employee's appeal of an adverse utilization review decision as via Independent Medical Review. That section specifically states,

> *A utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section*. Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review in accordance with this section. (Labor Code Section 4610.5(e), emphasis added)

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[2] For the evolution of the medical treatment dispute process, *see gen State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal. 4th 230, 237-245, [79 Cal. Rptr. 3d 171, 186 P.3d 535, 73 Cal. Comp. Cases 981], *and see*, *Dubon v. World Restoration* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board *en banc) (Rev. den)*

Any doubt that the Appeals Board lacks jurisdiction to directly review a utilization review decision is conclusively put to rest when one recognizes that in 2012, when the legislature enacted Independent Medical Review as part of SB 863 (Stats. 2012, ch. 363.), the legislature also amended the jurisdictional provisions of Labor Code Section 4604 to limit the Appeals Board's jurisdiction.[3] Under that amendment, the Appeals Board expressly no longer has jurisdiction to review a medical treatment dispute arising from an employer's utilization review determination *except* as an appeal from an independent medical review determination under Labor Code Section 4610.5. If there is no IMR decision to appeal (i.e., tardy action by the Administrative Director produces no valid decision via IMR), the employee would be left without a remedy through no fault of his own.

Such a possibility, that a litigant could be left with no remedy due to an administrative tribunal's error of timing, thus depriving the aggrieved party of his appeal through no fault of his own, has been considered numerous times and rejected in favor of finding such time limits merely directory. For example, in *Edwards v. Steele* (1979) 25 Cal. 3d 406 (rejecting the contention that untimely action on a zoning board appeal invalidates the action), the Court observed,

> The probable intent underlying the ordinance was to assure *to the aggrieved party* a reasonably timely hearing of, and decision on, his administrative appeal. To hold that the provisions are mandatory and jurisdictional under the circumstances of the present case would seemingly defeat the foregoing purpose by depriving the aggrieved party of his appeal through no fault of his own. Moreover, no "consequence or penalty" for noncompliance with the time limitations

[3] Labor Code Section 4604 states, "Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5*." (emphasis added)

> is contained in the ordinance, and nothing in the language thereof suggests an intent to nullify a timely filed appeal solely because the board has delayed in acting thereon. [Id, at 410]
>
> Several appellate cases have recognized that it would be improper, or even unconstitutional, to hold that an administrative board's failure to act within the period prescribed by statute or ordinance divests a board of its jurisdiction to rule upon a timely appeal [Id, at 411 (*citations omitted*)]
>
> … seemingly mandatory language need not be construed as jurisdictional where to do so might well defeat the very purpose of the enactment or destroy the rights of innocent aggrieved parties. In other words, the provision at issue may be considered mandatory only in the sense that the board "could be mandated to act if it took more time than the short period allotted." (*Liberty Mut. Ins. Co., at p. 510* [interpreting the seemingly mandatory language of the 30-day limitation in *Lab. Code, § 5313*]; see also *McDonald's Systems of California, Inc., v. Board of Permit Appeals, supra, 44 Cal. App. 3d at p. 541*.) [Id, at 412 (citations omitted)]

Similarly, in *California Correctional Peace Officers Assn. v. State Personnel Board* (1995) 10 Cal. 4th 1133, the Court interpreted the Government Code section 18671 requirement that a decision be rendered within the statutory 6-month time frame as directory, not mandatory, and that "The Board retains jurisdiction over the employee's appeal notwithstanding its failure to render a decision within the statutory time limits.." [Id, at 1138]. And in *Chrysler Corp. v. New Motor Vehicle Board* (1993) *12 Cal. App. 4th 621* the Court held that the 30-day time limit to issue a decision under Veh. Code, § 3067 is directory only, noting that otherwise "the Protesting Parties would have a decision against them imposed through no fault of their own by means of a totally mechanical application of the time limit in the statute" [Id, at 630-631]

Reading the statutory scheme as a whole, Sections 4604 expressly limits the Appeals Board's jurisdiction over medical treatment disputes to that of an appeal of an IMR determination issued under 4610.5. The grounds for appeal are limited by statute to those grounds specified in 4610.6(h), none of which relates to compliance with the 30-day time directive. Thus there is no statutory basis for the WCAB to assert jurisdiction with regard to the 30-day time directive. Even where the Administrative Director's IMR decision is overturned on one of the statutory grounds, Labor Code Section 4610.6(i) expressly prohibits the appellate body (whether judge, appeals board or court) from making its own decision on the merits of the medical necessity issue,[4] instead limiting the remedy to sending the matter back to the Administrative Director for a new IMR.[5] Therefore, a WCALJ, the Appeals Board and the courts lack jurisdiction to issue their own decision on the merits of the medical necessity dispute. Lacking such jurisdiction on appeal, the party aggrieved by the adverse IMR decision would be without a remedy.

Such an outcome was expressly considered by the court in *Liberty Mutual Ins. Co v. IAC* (1964) 231 Cal. App. 2d 501 which rejected the contention that an award issued beyond the 30 day provision was invalid, noting that

> In many cases to interpret the statutory language as we are urged to do would be to declare that through failure to act the jurisdiction of the

[4] Labor Code Section 4610.6(i) states, "In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization."

[5] In this regard, Labor Code Section 4610.6(i) states, "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization."

> commission to make any award at all would be lost, and this without any fault of the party seeking relief. **By the mere inaction of the commission a right would be denied, the aggrieved party being helpless to prevent in any way the complete denial of his right**. … If the Legislature had intended to work so monstrous a result, it surely ought to have said so by language specifically declaring such intent. It did not do so. We hold that the commission did not lose jurisdiction and that the award it made was valid notwithstanding the failure to obey the statutory mandate respecting the time within which it ruled after submission. We think the Legislature, concerned with complaints of delay in theof (sic) Industrial Accident Commission cases, intended only to place the commission in such a position that it could be mandated to act if it took more time than the short period allotted. But that the Legislature intended to destroy rights is incredible. (Id, at 509-510)

As may be inferred from the decision in *Stevens,* the proper procedure to be followed when the IMR decision time was not met would have been either to file a Writ of Mandate to compel a decision or to request the AD assign the matter to a different IMR due to non-compliance by the first assignee. Instead, what the claimant did is wait for the decision and only challenged the process upon learning the IMR decision was adverse.[6][7]

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[6] In an analogous circumstance where a Qualified Medical Evaluator (QME) appointed by the Division of Workers Compensation fails to issue a medical report within the 30 day time frame allowed by Labor Code § 139.2(j)(1), the Appeals Board in *Fajardo v. W.C.A.B. (2007) 72 Cal. Comp. Cases 1158* (writ denied) and *County of Sonoma v. W.C.A.B. (Smith) (2008) 73 Cal. Comp. Cases 268* (writ denied), held that, in order to obtain a replacement QME panel due to a QME's failure to timely issue a report, a party must object and request a new panel prior to receipt of the report, thereby avoiding any gamesmanship. That same rationale should be applied herein, to avoid "doctor shopping" through the IMR process based on a belatedly raised timing technicality.

[7] One can only speculate whether claimant would be taking the same position herein if the IMR decision had been adverse to the employer who then sought to have it voided on "mandatory" grounds.

Given the express jurisdictional limits of the Appeals Board with regard to medical treatment disputes as outlined above, this Court can best preserve both the parties' appellate rights and the legislative intent by finding that Labor Code Section 4610.6(d) is directory, and that appeals must accord with the provisions of Labor Code Section 4610.6(h). We therefore urge this Court to find in accord with the *Stevens,* that the time limit is directory only, and reverse the incorrect decision below.

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D. BECAUSE THERE IS NO STATUTORY CONSEQUENCE NOR PENALTY ENACTED FOR THE FAILURE OF THE ADMINISTRATIVE DIRECTOR TO ISSUE ITS IMR FINDINGS WITHIN THE PRESCRIBED TIME FRAME, SUCH TIME SHOULD BE DEEMED DIRECTORY ONLY, IN ACCORD WITH THE GENERALLY ACCEPTED RULE OF STATUTORY INTERPRETATION

Where there is a lack of consequence or penalty for an administrative body's failure to meet a time frame, that time frame is generally held to be directory only. For example, in *McDonald's Systems of California, Inc. v. Board of Permit Appeals* (1975) 44 Cal. App. 3d 525 the Court found a permit appeal decision rendered beyond the municipal code's 40 day requirement to be directory only. In so doing, the Court (Id., at fn. 15) referenced the following in support of that conclusion:

> In *Garrison v. Rourke (1948) 32 Cal.2d 430 [196 P.2d 884]* [overruled on another issue *Kean v. Smith (1971) 4 Cal.3d 932, 939 (95 Cal.Rptr. 197, 485 P.2d 261*)], it was contended that the trial court lost jurisdiction to enter a judgment in favor of the contestant because the court did not file its findings of fact and conclusions of law "within ten days after the submission" of the case as prescribed by former section 8556 [now § 20086] of the Elections Code. The court ruled as follows: "*Section 5 of Article VI of the Constitution* of this state [citation] and article 3, chapter 2, division 10 (§§ 8550-8557) of the Elections Code, vest in the superior court jurisdiction to hear and determine election contests, and to

confirm or annul a contested election, or to declare that some other person has been elected. The jurisdiction thus vested may not lightly be deemed to have been destroyed. **The intent to divest the court of jurisdiction by time requirements is not read into the statute unless that result is expressly provided or otherwise clearly intended**. The consequence or penalty for the failure of the court to file findings of fact and conclusions of law within the designated period was not included in the statute. The defendant does not present a case where such a result ensued in the absence of the express requirement. That it was not to occur unless expressly provided is demonstrated by the fact that **when the Legislature wished to indicate that intent it adopted the simple expedient of including an express provision to that effect.** (See *Code Civ. Proc., § 660*, limiting the time for passing upon a motion for new trial; *Code Civ. Proc., § 657*, limiting the time when the court may file an order specifying insufficiency of the evidence as a ground for granting new trial.) The case of *Thomas v. Driscoll, 42 Cal.App.2d 23 . . .* involved *section 657 of the Code of Civil Procedure*, and **the correct rule is indicated in that decision as follows: A time limitation for the court's action in a matter subject to its determination is not mandatory (regardless of the mandatory nature of the language), unless a consequence or penalty is provided for failure to do the act within the time commanded."** (*Id., at pp. 435-436*. See *Steen v. City of Los Angeles (1948) 31 Cal.2d 542, 545-546 [190 P.2d 937]*; and *Cook v.*

*Civil Service Commission (1960) 178 Cal.App.2d 118, 128-130 [2 Cal.Rptr. 836]* [tardy action by civil service commission]; *Farmers etc. Nat. Bank v. Peterson (1936) 5 Cal.2d 601, 607 [55 P.2d 867]*; and *City of Los Angeles v. Hannon (1926) 79 Cal.App. 669, 673-674 [251 P. 247]* [failure of court to file decision within time prescribed by Code of Civil Procedure]; *Buswell v. Board of Supervisors (1897) 116 Cal. 351, 354 [48 P. 226]* [equalization of taxes after time prescribed, but within time which could have been but was not intended]; *Janet* v. *Industrial Acc. Com.* (1965) 238 Cal.App.2d 491, 497 [47 Cal.Rptr. 829]; *Liberty Mut. Ins. Co. v. Ind. Acc. Com. (1964) 231 Cal.App.2d 501, 508-510 [42 Cal.Rptr. 58]*; *Peak v. Industrial Acc. Com. (1947) 82 Cal.App.2d 926, 932 [187 P.2d 905]*; and *Coombs v. Industrial Accident Com. (1926) 76 Cal.App. 565, 569 [245 P. 445]* [failure to make award under Workmens' Compensation Act within 30 days after the case is submitted]; *Anderson v. Pittenger (1961) 197 Cal.App.2d 188, 193-*

> *194 [17 Cal.Rptr. 54]* [city council's tardy denial of a variance on review of planning commission's grant]; *Koehn v. State Board of Equalization (1958) 166 Cal.App.2d 109, 118-119 [333 P.2d 125]* [failure of A.B.C. Appeals Board to enter order within time prescribed]; *Barry v. Contractors State License Board (1948) 85 Cal.App.2d 600, 607 [193 P.2d 979]* [failure of hearing officer to enter decision within time prescribed]; and *Bernardo v. Rue (1914) 26 Cal.App. 108, 110 [146 P. 79]* [failure to file findings and judgment in election contest within time prescribed].)

The legislature clearly knows how to specify a consequence or penalty, as it has done so under the examples cited in the above-referenced footnote.[8] The Labor Code clearly provides no consequence or penalty for the Administrative Director's failure to issue IMR findings within the statutory time frame. Consistent with the principle discussed above, the Court in *Stevens* held the time provision of Labor Code Section 4610.6(b) to be directory only, noting that

> In the absence of a penalty, consequence, or contrary intent, a time limit is typically considered to be directory, and its violation does not

[8] Examples of the legislature specifying a consequence or penalty for untimely action by a tribunal include the following: CCP 629(b) ["The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before that date, the effect shall be a denial of that motion without further order the court."] CCP 630(f) ["the power of the court to act under the provisions of this section shall expire 30 days after the day upon which the jury was discharged, and if judgment has not been ordered within that time the effect shall be the denial of any motion for judgment without further order of the court."]; CCP 663a(b) ["the power of the court to rule on a motion to set aside and vacate a judgment shall expire 60 days from the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or 60 days after service upon the moving party by any party of written notice of entry of the judgment, whichever is earlier, or if that notice has not been given, then 60 days after filing of the first notice of intention to move to set aside and vacate the judgment. If that motion is not determined within the 60-day period, or within that period, as extended, the effect shall be a denial of the motion without further order of the court"].

> require the invalidation of the action to which the time limit applies. (See, e.g., *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145.)

We therefore urge this Court to find in accord with the decision in *Stevens*, finding 4610.6(d) directory only, and reverse the incorrect decision below.

## E. THE INTERPRETATION OF LABOR CODE SECTION 4610.6(d) BELOW WOULD FRUSTRATE THE CLEAR LEGISLATIVE INTENT OF INDEPENDENT MEDICAL REVIEW THAT MEDICAL DECISIONS BE MADE BY QUALIFIED INDEPENDENT PHYSICIANS THROUGH AN ADMINISTRATIVE PROCESS, RATHER THAN AN ADVERSARY PROCESS

The legislative history of adoption of Independent Medical Review in 2013 was summarized by the court in *Stevens*, wherein it was pointed out that the 2004 workers compensation reforms requiring employer utilization review based on uniform medical treatment guidelines were intended to transfer initial medical decision-making from the lay claims adjuster to qualified medical professionals competent to evaluate the clinical issues involved [9] but otherwise left the traditional adversary process intact. Further reforms effective in 2013 adopted Independent Medical Review instead of the traditional adversary process, and the legislative history makes it clear that the rationale was as follows:

> (d) That the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment.
> (e) That having medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to using evidence-based medicine to provide injured workers with the highest

[9] *2015 Cal. App. LEXIS 968, slip opinion Pg. 20*

quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy.
(f) … that independent medical review is a new state function pursuant to paragraph (2) of subdivision (b) of Section 19130 of the Government Code that will be more expeditious, more economical, and more scientifically sound than the existing function of medical necessity determinations performed by qualified medical evaluators appointed pursuant to Section 139.2 of the Labor Code. The existing process of appointing qualified medical evaluators to examine patients and resolve treatment disputes is costly and time-consuming, and it prolongs disputes and causes delays in medical treatment for injured workers. Additionally, the process of selection of qualified medical evaluators can bias the outcomes. Timely and medically sound determinations of disputes over appropriate medical treatment require the independent and unbiased medical expertise of specialists that are not available through the civil service system.
(g) That the establishment of independent medical review and provision for limited appeal of decisions resulting from independent medical review are a necessary exercise of the Legislature's plenary power to provide for the settlement of any disputes arising under the workers' compensation laws of this state and to control the manner of review of such decisions.
(SB863, Stats 2012, Ch. 363, section 1 , emphasis added)

As confirmed in the legislative committee hearings[10], the intent behind adoption of IMR and substantially restricting the role of the WCAB was as follows:

SB 863 proposes to change the way medical disputes are resolved. Currently, when there is a disagreement about medical treatment issues, each side attempts to obtain medical opinions favorable to its position, and then counsel for each side tries to convince a workers' compensation judge based on this evidence what the proper treatment is**. This system of "dueling doctors" with lawyers/judges making medical decisions has resulted in an extremely slow, inefficient process that many argue does not provide quality results. Long delays in obtaining treatment result in poorer outcomes, reduced return to work potential, and excessive costs in the system, none of which are good for injured workers**. SB 863 would instead adopt an independent medical review

[10] Assembly Committee on Insurance, August 31, 2012 Hearing

> system patterned after the long-standing and widely applauded IMR process used to resolve medical disputes in the health insurance system. Thus, a conflict- free medical expert would be evaluating medical issues and making sound medical decisions, based on a hierarchy of evidence-based medicine standards drawn from the health insurance IMR process, with workers' compensation-specific modifications. The bill contains findings that this system would result in faster and better medical dispute resolution than existing law.

As also observed by the court in *Stevens,* the entire system benefitted from the 2004 reforms (adoption of uniform treatment guidelines using standardized utilization review procedures), and from the 2013 substitution of independent medical review to resolve treatment disputes in lieu of the traditional litigation process.[11].

The legislative history of enactment of Independent Medical Review reflects a clear intent to curtail the Appeals Board's jurisdiction, instead favoring a process relying upon established principles of evidence-based medicine instead of a legal jousting match. Only an interpretation of Labor Code Section 4610.6(d) as directory and not mandatory furthers that legislative purpose. We therefore urge this Court to find in accord with *Stevens*, finding 4610.6(d) directory only, and reverse the incorrect decision below.

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[11] "For workers, the reforms ensured that treatment requests would no longer be modified, delayed, or denied except by a physician. "This represent[ed] a significant departure from the [former] process . . ., which permitted an employer or claims adjuster (without review by a physician) to object to a treatment request." (*Sandhagen, supra,* 44 Cal.4th at p. 240.) Workers also secured a guarantee that UR decisions rendered in their favor could not be challenged by employers on medical-necessity grounds. (Cal. Code Regs., tit. 8, § 9792.10.1.) This ensured faster final resolution of these decisions, and it constituted a meaningful curtailment of employers' rights. For employers, the reforms promised to reduce insurance costs by creating uniform medical standards and reducing litigation." *2015 Cal. App. LEXIS 968, slip opinion Pg. 21*

## CONCLUSION

The Appeals Board's decision below [that 4610.6(d) is not merely directory and thus a late IMR decision by the Administrative Director vests the Appeals Board with independent jurisdiction to adjudicate the medical necessity issue] is in direct contravention of Labor Code Section 4610.5(e) (prohibiting utilization review decisions from being reviewed or appealed except via independent medical review), Labor Code Section 4610.6(h) (limiting the grounds under which the Appeals Board may invalidate an independent medical review decision of the Administrative Director), Labor Code Section 4604 (eliminating the WCAB's original jurisdiction over treatment disputes, except as set provided in 4610.5), and Labor Code Section 4610.6(i) (prohibiting the WCAB from making its own determination of medical necessity and instead requiring the matter be remanded to the Administrative Director for another IMR). The decision thus violates both the express statutory provisions and the legislative intent. As such, this Court should reverse the decision below.

Respectfully submitted,
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